

NONPROFIT ORGANIZATIONS –
KEY ISSUES IN THE NEW IRS FORM 990

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TABLE OF CONTENTS

	Page
1. FORM 990 TIMELINE	1
2. OVERVIEW	1
3. COMPENSATION REPORTING	3
4. CORPORATE GOVERNANCE AND DISCLOSURE	5
5. SPECIAL ACTIVITIES	6
6. SPECIAL KINDS OF ORGANIZATIONS	7
7. EXTRA-STRENGTH DISCLOSURE	7
8. READY OR NOT?	7
9. GET READY	8
10. WILL THE IRS BACK OFF?	9

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1. FORM 990 TIMELINE

June, 2007 – IRS releases new Form 990 for public comment

December, 2007 – Final version of new Form 990 released

Tax years beginning in 2008 – First year in which new Form 990 must be used

Tax years beginning in 2009 – First year in which private activity reporting required

2. OVERVIEW

2.1. Who files it?

- ◆ Exempt under Section 501(a), (e), (f), (k), (n), including all Section 501(c) organizations
- ◆ For gross receipts \geq \$1M *or* total assets \geq \$2.5M at year end, file Form 990.
 - ⇒ For gross receipts $<$ \$1M *and* total assets $<$ \$2.5M at year end, can opt to file Form 990-EZ
 - ⇒ \$1M/\$2.5M thresholds drop to \$500,000/\$1.25M for 2009 and \$200,000/\$500,000 after 2009.

¹ I am indebted to Mary Rauschenberg of Deloitte Tax LLP and Diane Cromwell of Starfish Consulting for their excellent presentation “Top Ten Things a CFO Should Consider on the Redesigned Form 990” presented to an AICPA conference on November 6, 2008.

⇒ For gross receipts under \$25,000 (\$50,000 after 2009), file an e-postcard (Form 990-N)

⇒ See attached article *IRS Files Phase-In Chart for New Form 990 Series*

◆ Not:

⇒ Private foundations (they use Form 990-PF)

⇒ Black lung benefit trusts

⇒ Organizations included in group returns

⇒ Churches

2.2. Core tax form

◆ 11 pages

2.3. Schedules

◆ 16 Schedules for various activities

2.4. Corporate governance issues

◆ The new form asks questions that would be more appropriate for an active Attorney General than a tax collecting reporting agency

2.5. New Form 990 = “Annual report”

◆ The new form requires the organization to explain how it has been fulfilling its mission.

◆ The new return is an important way for the organization to communicate to its donor base, to the press, to Congress, and to its target community – like it or not

⇒ The form must be published

⇒ The IRS makes the forms available to GuideStar.org, which publishes them on the internet

- ◆ Think of the new Form 990 more as an annual report to the public and not as a private tax return

3. **COMPENSATION REPORTING**

3.1. **Where?**

- ◆ Part VII and Schedule J (if required)

3.2. **How?**

- ◆ Calendar year basis
 - ⇒ A fiscal year organization reports for the calendar year that ended within its fiscal year

3.3. **Who?**

- ◆ Current officers, directors and trustees (whether or not compensated)
- ◆ Current key employees
- ◆ Five highest compensated employees
- ◆ Former officers, key employees and highest compensated employees (if over \$100,000 of W-2/1099 compensation)
- ◆ Former directors and trustees (if over \$10,000 of W-2/1099 compensation for their services as directors or trustees)
- ◆ “Key employee”
 - ⇒ Receives W-2/1099 compensation of over \$150,000 from the reporting organization and all related organizations
 - ⇒ Has the power of an officer or director
 - ⇒ Manages $\geq 10\%$ of the organization
 - ⇒ One of the top 20 highest compensated of the reporting organization and all related organizations

3.4. **Report what?- Part VII**

- ◆ W-2/1099 comp paid by reporting organization
- ◆ W-2/1099 comp paid by all related organizations (over \$10,000; but no \$10,000 threshold for payments to directors and trustees for services as directors and trustees)
- ◆ Exceptions:
 - ⇒ Volunteers
 - ⇒ Bank or Financial Institution Trustee

3.5. **Report what? – Schedule J**

- ◆ Who?
 - ⇒ Former officer, director, trustee, key employee or highest compensated employee gets > \$150,000 W-2/1099 comp.
 - ⇒ Services paid to Part VII person by an unrelated organization for services to the organization
- ◆ What?
 - ⇒ “Bad” perks (examples: first class travel, spouse travel)
 - Requires explanation
 - ⇒ Suspect compensation (examples: golden parachutes, SERPs, percentage of profits or revenues, “first bites” that escape intermediate sanctions)
 - ⇒ How CEO comp determined
- ◆ Requires advance planning
 - ⇒ How to report
 - ⇒ Collecting info from related organizations

⇒ Acclimatizing the “reportees”

4. CORPORATE GOVERNANCE AND DISCLOSURE

4.1. Part VI – Governance

- ◆ Independent directors and major delegated authority
- ◆ Minutes of meetings of the board of directors and all committees
- ◆ Did the board review the Form 990 before it was filed? How was it reviewed?
- ◆ Family and business relationships among management
- ◆ Changes to articles or bylaws
- ◆ Joint ventures (broadly defined)?
- ◆ Embezzlement during the year?
- ◆ How are policies and minutes made available to the public?

4.2. Part VI – Policies

- ◆ Conflicts of interest policy?
- ◆ Whistleblower policy?
- ◆ Document retention policy?
- ◆ Independent director review of compensation of CEO/ED, officers and key employees?
- ◆ Policies for chapters, if any
- ◆ See the attached article *Compliance Effort Surrounding Forms 990 to be Multi-Step Process, Schultz Says*

4.3. **Part IX – Financial Statements and Audit Committees**

- ◆ Independent accountant prepared the financial statements?
Audited?
- ◆ Audit committee?

4.4. **Schedule L – Possible Conflicts of Interest**

- ◆ Transactions with interests persons (insiders)
- ◆ Excess benefit transactions
- ◆ Duty to make reasonable efforts to obtain info for the Form 990
 - ⇒ Annual signed questionnaire is sufficient
 - So, develop and use a questionnaire

5. **SPECIAL ACTIVITIES**

5.1. Lobbying and Politics (Schedule C)

5.2. Donor-Advised Funds
Conservation Easements
Art Collections (Schedule D)

5.3. Activities Outside the U.S.A. (Schedule F)

5.4. Fundraising and Gaming (Schedule G)

5.5. Grant-Making (Schedule I)

5.6. Tax-Exempt Bonds (Schedule K)

- ◆ New reporting for bonds issues after 2002
- ◆ Some reporting delayed until 2009 reporting year
- ◆ Requires new record-keeping methods now – or sooner.

- ◆ See attached article *IRS to Skip Preliminary Adverse Letters, Keep Pressure on Bond Rebate Failures*

5.7. In-Kind Contributions (Schedule M)

5.8. Terminating the Organization and/or Disposing of Substantially All of its Assets (Schedule N)

6. **SPECIAL KINDS OF ORGANIZATIONS**

6.1. Schools (Schedule E)

- ◆ Focus on racial integration

6.2. Hospitals (Schedule H)

- ◆ Some info on extent of charitable health care deferred until the 2009 reporting year

7. **EXTRA-STRENGTH DISCLOSURE**

7.1. Joint ventures

7.2. Related organizations

7.3. Basis for exemption from private foundation status

7.4. Endowment funds

8. **READY OR NOT?**

8.1. Is the necessary info being captured?

- ◆ Is the organization using the definitions in the instructions to the Form 990?

8.2. Related entities need to centralize the bookkeeping functions

- ◆ Requires a new kind of leadership in decentralized organizations
- ◆ Must be a priority at the CFO level

- 8.3. Get an attorney involved early to review governance issues, policies
- 8.4. Budget additional person-hours to comply with the new reporting requirements
 - ◆ Set a monthly compliance schedule to track readiness
- 8.5. Consequences of not being ready –
 - ◆ The organization will look worse than its peers in areas that matter to donors, the IRS, the Attorney General and the press
 - ◆ The CFO and the CEO will look bad to the board
 - ◆ Board members may be embarrassed and resign

9. **GET READY**

- 9.1. Make sure the mission statement is up to date
 - ◆ Does it reflect all of the activities of the organization?
 - ⇒ Should the organization prune activities that do not relate closely to its mission?
 - ◆ It should synch with the purpose clause in the organization's articles of incorporation
 - ◆ Consider renaming activities to clarify how they promote the mission
- 9.2. Do a dress-rehearsal return
- 9.3. See what areas needs to be addressed
 - ◆ Address them
 - ◆ Might require operational or accounting changes
 - ◆ Might require culture changes for the new transparency

- 9.4. Repeat dress-rehearsal return and follow up
- 9.5. Keep the organization focused on presenting its best face to the world by being ready to excel in each area of the return

10. **WILL THE IRS BACK OFF?**

- 10.1. No, the IRS has been pummeled about asking for info that is not required by the Internal Revenue Code.
- 10.2. The response: These are best practices. Organizations that adopt best practices are less likely to have tax problems.
 - ◆ Statistical basis? None.
 - ◆ Likelihood of the IRS backing off in the next couple of years? None, unless challenged in court, which is not likely.
 - ◆ See the attached article *Caplan & Drysdale Attorney Asks Treasury for “Definitive” Guidance on EO Governance*
- 10.3. Instead, the IRS will probably treat filing a partially incomplete Form 990 as failure to file the tax return. The IRS might see legislation imposing penalties on the officers for an incomplete Form 990. See the attached article *IRS Eyeing Revision of Penalty Regime Following Debut of Redesigned Form 990*.
- 10.4. And some CPAs might stop preparing Forms 990. See the attached article *Complex Form 990 Spurs CPAs to Pull Out of Tax Preparation Business, Partner Says*. Tax-exempt organizations do not have that option.

[End of outline.]